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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In the Matter of

Amendment of the Commission's Rules
to Establish Competitive Service
Safeguards for Local Exchange Carrier
Provision of Commercial Mobile
Radio Services

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WT Docket No. 96-162

COMMENTS OF GTE

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affiliated domestic telephone and wireless
companies

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SUMMARY

The Commission should refrain from adopting the *Notice's* proposals to impose, for the first time and after more than a decade of service, new separate affiliate and nonstructural safeguards on all non-BOC Tier 1 LECs providing commercial mobile radio services ("CMRS"). Adoption of these regulations without any evidence of past anticompetitive behavior is inconsistent with the deregulatory objectives of the 1996 Telecommunications Act and contrary to the Sixth Circuit Court of Appeals' decision in *Cincinnati Bell v. FCC*, which cautioned the Commission against imposing regulations based on predictive assumptions. The absence of actual anticompetitive conduct demonstrates that the Commission's existing rules more than adequately foreclose LEC/CMRS cost-shifting, price discrimination and other anticompetitive conduct.

The *Notice* also improperly assumes that all Tier 1 LECs must be regulated like BOCs. However, the FCC, the Congress, and Judge Greene have repeatedly acknowledged that Independent LECs are significantly different from BOCs. Indeed, the 1996 Telecommunications Act most recently underscored that fact in freeing GTE from separate affiliate requirements while imposing such obligations upon BOCs.

Finally, the *Notice's* reliance on regulatory parity as a justification for the proposed regulations is misplaced. Regulatory parity itself is an insufficient basis for Commission action. Rather, the Commission must focus on whether the proposed regulations on LEC provision of CMRS serve the public interest. According to the Commission's own previous determinations in the PCS context, the answer must be no.

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COMMENTS OF GTE

GTE Service Corporation ("GTE"), on behalf of its affiliated domestic telephone and wireless companies, respectfully submits its comments in response to the Notice of Proposed Rulemaking in the above-captioned proceeding.¹ This rulemaking was prompted by a court order that found the Commission's failure to give a reasoned explanation for retaining the structural safeguards established for Bell Operating Companies ("BOCs") in their provision of cellular service to be arbitrary and capricious.

In the ostensible pursuit of a deregulatory initiative, the Commission is proposing to impose, for the first time, regulatory burdens on a category of local telephone companies that have provided commercial mobile radio services ("CMRS") for well over a decade without any evidence of marketplace discrimination or anticompetitive

¹ Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services, FCC 96-319 (released, Aug. 13, 1996) ("Notice" or "NPRM").

conduct. As detailed below, GTE believes that establishing these unnecessary regulations is: (1) arbitrary; (2) antithetical to the congressional intent embodied in the 1996 Telecommunications Act ("the 1996 Act");² (3) contrary to the holding in *Cincinnati Bell*;³ and (4) inconsistent with numerous FCC pronouncements that such unnecessary requirements rob consumers of efficiencies and innovation in CMRS markets.⁴

I. BACKGROUND

In *Cincinnati Bell*, the Sixth Circuit Court of Appeals remanded an FCC decision to retain Section 22.903 of the Commission's Rules,⁵ requiring structural separation for the BOCs' cellular subsidiaries. Specifically, the court found that the agency acted arbitrarily by failing adequately to justify retaining Section 22.903, particularly in light of the fact that the Commission had found the structural separation requirement to be unnecessary in the personal communications services ("PCS") context. Because cellular and PCS are expected to compete for customers on price, quality, and the type and scope of services, the court found the Commission's failure to eliminate the

² See Pub. L. No. 104-104, 110 Stat 56 (to be codified at 47 C.F.R. §151 *et seq.*); H.R. Conf. Rep. No. 458, (*Conference Report*). 104th Cong., 2nd Sess. 1 (1996).

³ *Cincinnati Bell v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995).

⁴ See Amendment of the Commission's Rules to Establish New Personal Communications Services, 8 FCC Rcd 7700, 7751 (1993) ("*Broadband PCS Order*").

⁵ 47 C.F.R. §22.903.

structural safeguard requirement for BOCs providing cellular service to be arbitrary and capricious. The court directed the FCC to reexamine whether Section 22.903 "still in any way serves the public interest," strongly implying that it did not on the record before the court.⁶

In remanding the case, the court asked the Commission to justify the continuing need for structural separation for BOC provision of cellular services. The court was particularly skeptical of the Commission's theoretical concern about possible anticompetitive conduct. Indeed, in remanding the FCC's cellular-PCS cross-ownership rule, the court cautioned that a "'predictive judgment' as to the possible future behavior of future marketplace entrants is highly suspect, makes little common sense, and the FCC provides to this Court nothing, no statistical data or even a general economic theory to support its argument."⁷

Instead of proposing simply to eliminate structural separation for BOC cellular operations in light of the court's ruling, the *Notice* "initiate[s] a comprehensive review of [the Commission's] existing regulatory framework of structural and nonstructural safeguards for local exchange carrier (LEC) provision of commercial mobile radio services (CMRS)."⁸ While acknowledging the growing CMRS competition and the substantial number of broadband CMRS competitors that are operating, or soon will be,

⁶ *Cincinnati Bell* at 768.

⁷ *Id.* at 760.

⁸ *Notice* at ¶1.

the Commission nonetheless proposes to extend new regulatory burdens to a category of carriers that have never been subject to such requirements in the CMRS context.

To date, Section 22.903 only has been applied to AT&T, and to the divested BOCs. The FCC justified applying structural separation requirements to BOCs when cellular was in its infancy because of concerns that such companies might hinder competition developing in the cellular market. The GTE Telephone Operating Companies ("the GTOCs") and other Tier 1, non-BOC LECs have never been subject to Section 22.903, notwithstanding that these carriers or their affiliates have provided in-region cellular services since the early 1980s.⁹

To GTE's knowledge, the FCC has received no complaints of anticompetitive behavior by the GTOCs favoring their affiliated cellular operations, either in-region or out of region, in over 15 years of operation. Significantly, the *Notice* points to no evidence of anticompetitive conduct by these non-BOC Tier 1 LECs.¹⁰ It is no doubt in large part because of the absence of actual anticompetitive conduct that the FCC has declined to impose separation safeguards for LEC provision of other CMRS, including

⁹ In fact, one frequency block for cellular service was specifically reserved for a wireline carrier in every market. See *Cellular Communications Systems*, 86 FCC 2d 469 (1982); *Order on Reconsideration*, 89 FCC 2d 52 (1982).

¹⁰ Indeed, the *Notice* cites no evidence of anticompetitive conduct by any LEC, even BOCs. In a survey of FCC complaints over the last few years, GTE was unable to find any complaints against any LECs of such anticompetitive conduct.

PCS and specialized mobile radio ("SMR") services, concluding that such safeguards would be contrary to the public interest.¹¹

Yet, despite the absence of the evidence the court in the *Cincinnati Bell* case determined to be necessary, the *Notice* proposes substantial additional regulations over the provision of all broadband CMRS services by all Tier 1 LECs. Under one proposal, streamlined separate affiliate and nondiscrimination requirements of Section 22.903 for BOC provision of in-region cellular service generally would be retained with a sunset provision. Alternatively, the *Notice* proposes the immediate elimination of Section 22.903 and adoption of new separate affiliate and nonstructural safeguard requirements for all Tier 1 LECs providing CMRS. The *Notice* proposes to require all Tier 1 LECs providing in-region CMRS to file with the FCC a detailed nonstructural safeguard plan.¹²

¹¹ See *Broadband PCS Order*, 8 FCC Rcd at 7751; Eligibility for the Specialized Mobile Radio Services and Radio Services in the 220-222 MHz Land Mobile Band and Use of Radio Dispatch Communications, 10 FCC Rcd 6280, 6294 (1995) ("*Wireline SMR Order*"). In both instances, the FCC concluded that existing safeguards, such as the cost accounting rules, would suffice to combat possible discrimination and cross-subsidization.

¹² *Notice* at ¶7. Non-structural safeguards include the following elements: (1) a description of a separate affiliate that maintains separate books of account, does not jointly own transmission or switching facilities with the LEC, and obtains any exchange telephone company-provided communications services at tariffed rates and conditions; (2) Part 64 and Part 32 accounting compliance showings, with copies of the relevant cost allocation manual changes attached; (3) interconnection compliance showings; (4) a description of network disclosure compliance plans; and (5) a description of planned compliance with the customer proprietary network information ("CPNI") requirements.

The *Notice* also proposes to add new separation requirements that prohibit joint ownership of facilities and intra-company transactions rules.

II. THE PROPOSED RULES FOR NON-BOC TIER 1 LECs ARE WHOLLY UNNECESSARY AND CANNOT BE JUSTIFIED.

GTE submits that the *Notice's* approach constitutes a solution in search of a problem. Imposition of these regulations without evidence of past problems is clearly contrary to the Sixth Circuit's condemnation of regulations based on unsupported predictive assumptions. Even assuming that there were evidence supporting these restrictions for the BOCs, the FCC, the Congress and Judge Greene have repeatedly imposed less stringent regulations on Independent LECs because of the inherent differences between these two types of carriers. Moreover, the *Notice's* ostensible reliance on regulatory parity as a justification for regulating Tier 1 LECs is misplaced: there is no justification for imposing these regulations on Tier 1 LECs. Instead, the Commission should reiterate its previous determination in the PCS context that separate affiliate requirements would jeopardize the public interest by reducing the ability of Tier 1 LECs to provide efficient and innovative offerings. Any other result would be contrary to the deregulatory policy of the 1996 Act.

A. There Is No Evidence To Support The Proposed New Rules.

The *Notice* asserts that "requiring . . . LEC[s] to establish a separate affiliate to provide a competitive service lessens the opportunities for cost-shifting, price

discrimination and interconnection discrimination, and increases the ability of both competitors and the Commission to detect any anticompetitive behavior."¹³ Yet, the *Notice* offers no specific findings that such discrimination has occurred in the absence of regulatory requirements. This is not surprising given that there is no credible evidence that the non-BOC Tier 1 LECs have shifted costs or engaged in any such discriminatory conduct.

A review of FCC files maintained by the Enforcement Divisions of both the Common Carrier Bureau and the Wireless Telecommunications Bureau suggests that, after more than a decade of operation, no GTOC has been the subject of the types of complaints or allegations of misconduct purportedly to be deterred by the proposed rules. Nor has an internal review by GTE's management revealed any such complaints. A similar survey of FCC files fails to disclose any allegations or patterns of misconduct relating to other non-BOC Tier 1 LECs.¹⁴ Moreover, the FCC itself recently has rejected arguments that LECs will favor their CMRS affiliates I

¹³ *Notice* at ¶117.

¹⁴ Again, files maintained by the Enforcement Divisions of both the Common Carrier Bureau and the Wireless Telecommunications Bureau were reviewed for complaints against Cincinnati Bell Telephone Company, Citizens Telephone Company, Lincoln Telephone Company, and Southern New England Telephone Company. Even if there had been isolated complaints against such carriers, clearly there is no pattern of discrimination sufficient to justify the imposition of new burdensome regulations on non-BOC Tier 1 LECs.

n pricing to the disadvantage of competitors as "unsupported allegation[s] of misconduct."¹⁵

**B. Regulation Based On Predictive Assumptions About Behavior
Unsupported By Fact Is Contrary To The Holding In *Cincinnati Bell*.**

The *Notice* repeatedly refers to the *Cincinnati Bell* case, suggesting that new regulations are in fact required by this decision.¹⁶ However, this reliance mischaracterizes that decision. In fact, the court in *Cincinnati Bell* criticized the Commission for failing to remove regulations when the factual predicate that may once have justified those regulations no longer existed. Here, by proposing to impose regulation without ever establishing that factual predicate, the Commission again runs afoul of the court's core concern.

The Commission's proposal reflects a prediction that LEC and CMRS affiliates will, unless burdened by regulations, violate prohibitions against discrimination and cross-subsidy. However, the Commission cites no evidence for this assumption, nor offers specific findings that such discrimination, in fact, has occurred in the absence of regulatory requirements. As discussed above, none exists.

¹⁵ Application of Pacific Telesis Mobile Services for a License to Provide Broadband PCS Service on Block B in the San Francisco-Oakland-San Jose Major Trading Area, DA 95-1414 (released Jun. 23, 1995).

¹⁶ See, e.g., *Notice* at ¶87.

Without factual grounds for imposing such a separate affiliate requirement, the proposed regulation is not only contrary to law, but unnecessary and unwarranted. Given the vast changes now transforming the telecommunications marketplace, the Commission should not lightly extend burdensome regulations -- such as the separate affiliate requirement at issue here -- without a clear, demonstrable showing of need.

C. Existing FCC Rules And Statutory Requirements More Than Adequately Foreclose LEC/CMRS Discrimination Or Anticompetitive Conduct.

As shown below, the risks of cost-shifting, price discrimination and other anticompetitive conduct are already thoroughly addressed by the Commission's current arsenal of regulations. In addition, interconnection rights are guaranteed by Sections 251 and 252 of the 1996 Act and extensive cost accounting safeguards will prevent theoretical cross-subsidization. Moreover, state oversight of interconnection agreements further prohibits any such discrimination. Thus, existing FCC rules and statutory requirements more than adequately foreclose LEC/CMRS discrimination or anticompetitive conduct.

1. Interconnection requirements will prevent theoretical Incumbent LEC discrimination.

The *NPRM* expresses concern that an Incumbent LEC ("ILEC") may not interconnect with competitors and other telecommunications carriers on a

nondiscriminatory basis. However, separation between the ILEC and CMRS businesses simply is not a necessary or appropriate measure to achieve this result.

Sections 251 and 252 of the 1996 Act contain all the regulatory protections that are necessary to ensure that unaffiliated telecommunications carriers gain fair interconnection to an ILEC's network. First, Section 251(c) requires an ILEC to negotiate in good faith with any requesting carrier to establish interconnection terms. Second, subsection (c)(2) requires that ILECs interconnect with requesting carriers at any technically feasible point in the ILEC network and prohibits them from discriminating not only among requesting carriers but also between requesting carriers and themselves. Third, subsection (c)(4) requires that an ILEC permit a requesting carrier to resell the ILEC's retail services at discounted rates. Fourth, subsection (c)(5) requires an ILEC to inform potential competitors of changes to its network that they need to ensure their interconnected services work with the ILEC network. Finally, subsection (c)(6) requires that ILECs provide unbundled access to network elements on terms that are nondiscriminatory.

In the event that negotiations fail, any party may request that state commissions arbitrate the dispute and decide fair interconnection terms and such decisions may be appealed to a federal district court. The FCC has announced that it will police

compliance with interconnection obligations as well.¹⁷ Combined, these statutory provisions provide powerful regulatory tools to ensure that interconnection is available on a nondiscriminatory basis. Thus, additional requirements, such as the separation proposed in the *Notice*, are unnecessary.

2. There are no meaningful incentives or opportunities for LEC cross-subsidies.

Traditional regulatory concerns about cross-subsidy do not justify imposition of separation between ILEC and CMRS operations. Because the 1996 Act opens all markets to competition, whatever motivation may have existed for ILECs to cross-subsidize is eliminated. Specifically, a company needs two things in order to gain a competitive advantage through cross-subsidization: (1) a line of business of sufficient size to fund below cost pricing in the line of business being subsidized; and (2) no competition in the line of business funding the subsidy that could undermine the subsidy. If competition is viable in the subsidizing business, the company cannot cross-subsidize because competitors would easily underprice the company, and thus eliminate the source of the subsidy. In addition, price cap carriers, such as the GTOCs,

¹⁷ GTE believes that the FCC has exceeded its authority under the statute. See Joint Motion of GTE Corporation and the Southern New England Telephone Company for Stay Pending Judicial Review, CC Docket No. 96-98 (filed Aug. 28, 1996). If the Commission's authority to impose detailed interconnection rules is affirmed, however, there is no reason to believe that structural separation or nonstructural safeguards are needed in addition to direct enforcement of these FCC rules. Moreover, GTE notes that even if the FCC is reversed, state regulation sufficient to prevent discrimination will remain in effect.

have no motivation to cross-subsidize competitive businesses with regulated service revenues as they cannot raise regulated service prices to recoup the subsidy.

Furthermore, existing cost accounting safeguards contained in Parts 32 and 64 of the Commission's Rules fully prevent misallocation of costs. Part 32 of the Commission's Rules contains a comprehensive cost accounting system designed to track costs accurately and to create records that can be reviewed to detect improper booking of costs. Part 64 of the Commission's Rules sets forth detailed procedures for ensuring that costs from unregulated businesses are excluded from accounts used to establish regulated rates. These rules dictate that costs for transactions between regulated and unregulated operations must not harm ratepayers, often erring on the side of regulated ratepayers by excluding more costs from regulated accounts than is necessary to compensate regulated operations for services they provide to competitive businesses. On a regular basis, the GTOCs file a comprehensive cost allocation manual which demonstrates full compliance with these rules. Moreover, the Commission's Rules require annual independent audits attesting to compliance with the cost accounting safeguards.

The FCC itself has recognized the effectiveness of its existing rules in combating the potential for cross-subsidy.¹⁸ Because the current accounting rules will fully protect

¹⁸ Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, 6 FCC Rcd 7571, 7591 (1991) ("*BOC Safeguards Order*"); vacated in part and remanded, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) ("*California III*"), cert. denied 115 S. Ct. 1427 (1994).

ratepayers and prevent even theoretical anticompetitive behavior, there is no need to impose separation requirements.

Finally, GTE believes that if ILECs were to engage in anticompetitive behavior, such noncompliance would readily be apparent without a separation requirement. Parties currently requesting interconnection are sophisticated telecommunications carriers that can be expected to bring complaints to regulators' attention promptly. All interconnectors, whether large or small, must have their contracts approved by state regulators. All contracts will be available for public inspection. Thus, in a marketplace where the players are intimately familiar with the technical and economic parameters of interconnection, a separate affiliate requirement is simply not needed either to prevent or detect anticompetitive conduct.

D. The GTOCs And Other Independent LECs Are Significantly Different From The BOCs As Recognized By The FCC's Past Actions And Congressional and Judicial Determinations.

Even assuming that the Commission found evidence that Section 22.903 or other separation should continue to apply to the BOCs, similar treatment for the Independent LECs is not justified. The FCC, the Congress and Judge Greene for years have recognized that the GTOCs and other LECs are significantly different from BOCs. Indeed, they have repeatedly applied substantially different regulation to these

companies than to the BOCs.¹⁹ The *Notice* offers no reason to reevaluate this policy at this time.

1. There is no factual basis for equating GTE and other Independent LECs with BOCs.

There is no factual basis for equating GTE and other Independent LECs with BOCs. Indeed, the Congress, Judge Greene (who had jurisdiction over both the AT&T and GTE Consent Decrees) and the Justice Department have all concluded that there are material distinctions between Independent LECs and the BOCs.²⁰ These distinctions arise mainly from the geographical and size characteristics of Independent LEC local exchanges.

More specifically, Independent LECs are much less geographically concentrated than the BOCs, serve less densely populated areas, and offer fewer access lines in any

¹⁹ The GTE ONA Order is the single exception to this otherwise consistent trend.

²⁰ See, e.g., *United States v. GTE Corporation*, 603 F. Supp. 730, 736-737 (D.D.C. 1984) (noting that GTOC operations are widely scattered, while the BOCs are concentrated; GTOCs control relatively fewer access lines); *United States v. GTE Corporation*, C.A. No. 83-1298 (D.D.C. Mar. 26, 1992) (granting GTOC authority to use Signaling System 7 technology crossing LATA boundaries; U S WEST was denied same authority); see also Transcript of Oral Argument at 44, *United States v. GTE Corporation* (D.D.C. Nov. 22, 1983) (C.A. No. 83-1298) (Department of Justice attorney stating: "GTE is significantly a different company.").

state than do BOCs.²¹ They also have on average smaller switches and transmission facilities than the BOCs, and lack the interexchange network of the more geographically compact BOCs. These substantial factual differences strongly mitigate against any presumption that "safeguards" found appropriate for the BOCs are similarly appropriate for Independent LECs.

a. Independent LECs have fewer access lines than BOCs on a state-by-state basis.

With rare exceptions, on a state-by-state basis, Independent LECs serve far fewer access lines than the BOCs. The GTOCs provide an excellent illustration of this point. Although the GTOCs provide local exchange services in 28 states and one insular point, in only one of these states (Hawaii) and in the insular point (the Northern Mariana Islands) is a GTOC the largest local exchange carrier. In virtually every other state, the GTOC is substantially smaller than the largest LEC in that state. For example, in each of the three states -- California, Florida, and Texas -- in which the GTOCs have the most lines, the GTOC is far from being the largest local exchange provider. In California, the ratio of BOC to GTOC access lines is 3.6:1, in Florida, 2.5:1,

²¹ The exceptions are offshore points, such as Hawaii which is served only by GTE Hawaiian Telephone Company, and the Commonwealth of the Northern Mariana Islands ("the Northern Mariana Islands"), which is served by Micronesian Telecommunications Corporation ("MTC").

and in Texas, 4.3:1.²² In some states, the GTOC is not even the second largest local exchange provider. The GTOCs rank third among the LECs in Nebraska, North Carolina and Ohio measured by access lines.

b. Independent LECs serve dispersed, less densely populated areas.

In addition, Independent LECs typically serve dispersed, less densely populated areas of the nation. Unlike the BOCs, Independent LECs are typically not confined to one particular region of the nation, but rather, are scattered throughout the United States. For example, GTOCs serve 28 states spreading from Pennsylvania to Hawaii and Alaska to Florida.²³ The most states any Regional BOC serves is 14. While no Regional BOC serves more than 33 LATAs, GTOCs operate in portions of 123 LATAs.

Even within those 28 states, the GTOCs' local telephone operations are often scattered over many non-contiguous, and less densely populated, areas. In states where both the GTOCs and the BOCs operate, the BOCs have 76 percent of the access lines while serving only 34 percent of the land area; in contrast, the GTOCs have 13 percent of the access lines in those states but serve 17 percent of the land

²² *TELEPHONE LINES AND OFFICES Converted To Equal Access*, Industry Analysis Division, Common Carrier Bureau, Table 5 at 12-13, 34-35 (June 1996).

²³ See *TELEPHONE LINES AND OFFICES Converted To Equal Access*, Table 5 at 22-23 (separate data for Contel/dba/GTE and GTE North for Minnesota) and at 36 (separate data for Contel /dba/GTE and GTE South for Virginia). The GTE/Contel merger actually *decreased* the GTOCs' density per mile.

area. The fact that the GTOCs' serve only a small percentage of the population within the nation's largest Metropolitan Statistical Areas ("MSAs") confirms this point. The GTOCs have a majority presence in only two of the top 50 MSAs in the United States. A GTOC is the sole exchange carrier in only seven of the 320 MSAs, accounting for less than one percent of the U.S. population. GTOCs serve a majority of customers in only another 19 MSAs, which collectively have less than three percent of the U.S. population.

2. Because the GTOCs' exchange areas are not regional in nature, GTE is dependent upon interconnection with other LECs for 80 percent of its CMRS systems.

The dispersion outlined above has the consequence of making an Independent LEC dependent upon interconnection with other LECs for a very substantial portion of its affiliated CMRS systems. For example, GTE's cellular operations have to obtain interconnection from unaffiliated LECs in systems serving approximately 80 percent of its POPs.²⁴ This contrasts with regionally concentrated RBOCs who have a significantly higher level of CMRS/LEC coverage overlap and extensive networks connecting points within their serving areas.

²⁴ See Appendix 1 for maps depicting GTE LEC and CMRS service areas.

3. As the Notice acknowledges, the 1996 Act reflects Congress' determination that the public interest does not require imposition on GTE of safeguards imposed upon BOCs.

Through its treatment of GTE, the legislative history of Section 601 of the Telecommunications Act of 1996 strongly reflects Congress' intention that Independent LECs not be subject to separate affiliate requirements. As Senator Pressler noted in the Senate debate, "GTE is the only non-Bell telephone company with such cumbersome proceedings. These procedures resulted in higher costs and hamper GTE's ability to compete."²⁵ Congress specifically eliminated all structural requirements of the GTE Consent Decree.²⁶ It seems illogical that Congress would remove separation requirements applicable to GTE under the GTE Consent Decree only to have the Commission create them for CMRS services.

The new interexchange provisions contained in Sections 271 (which governs BOC interLATA entry) and 272 (which imposes a separate affiliate requirement on the BOCs) provide further support for the view that Congress decided against applying the same requirements to GTE and other Independent LECs as to the BOCs. Although these sections do not apply to the provision of CMRS services, it is noteworthy that these provisions apply only to "Bell Operating Companies." Congress clearly determined that there was no need to extend the separation requirements of Section

²⁵ 141 Cong. Rec. S8076 (daily ed. Jun. 9, 1995) (statement of Senator Pressler).

²⁶ See 1996 Act, Section 601(a)(2).

272 to Independent LECs. There is no justification for the Commission now to apply different reasoning in the context of CMRS.

The Commission itself acknowledged that Congress intended to treat the BOCs and GTE differently when it noted that "GTE . . . is released from the constraints of the GTE Consent Decree pursuant to Section 601(a)(2), without any additional conditions, such as establishment of separate affiliates or meeting a competitive checklist, placed upon GTE's entry into in-region interLATA, *or any other services.*"²⁷

When Congress intended for sections of the Act to apply to GTE *and* other non-BOC local exchange carriers, it stated so unambiguously, as in Section 251. Coupled with the fact that the Conference Report's discussion of Section 272 makes no mention of GTE or other Independent LECs, there can be no doubt that Congress did not intend to apply a Section 272 separate affiliate requirement to Independent LECs. Therefore, given that Congress has found separation requirements unnecessary for all Independent LECs in the provision of interexchange service, the FCC should not now place such burdens on Independent LECs for CMRS.

E. Regulatory Parity Or Uniformity Of Standards Goals Provide No Basis For The Proposed Regulations.

The *Notice's* reliance on the *Cincinnati Bell* case as support for the proposed regulations and the need for "regulatory symmetry" and "uniformity" is misplaced. The

²⁷ *Notice* at ¶88, n.143.

Cincinnati Bell court suggested that, to achieve regulatory parity, Section 22.903 requirements should be eliminated as they no longer serve the public interest, according to the FCC's own findings. Moreover, neither regulatory parity nor uniformity is itself a sufficient basis for Commission action. Rather, in adopting regulations, the Commission must focus on its statutorily imposed objective or role -- to serve the public interest.²⁸ As shown below, the public interest compels elimination, rather than extension, of separate affiliate requirements.

1. **The court in *Cincinnati Bell* was concerned about the lack of factual predicate to justify the structural separation requirement for BOCs, not the lack of regulatory parity or uniformity.**

The *NPRM* repeatedly refers to the *Cincinnati Bell* decision when discussing the supposed need for regulatory symmetry and uniformity, implying that the court viewed lack of regulatory parity and uniformity as problems in themselves.²⁹ However, as discussed above, the *Cincinnati Bell* court was concerned with the FCC's decision to retain a separate subsidiary restriction on BOCs providing cellular service when the factual predicate justifying those regulations no longer existed.³⁰ Because cellular and PCS are expected to compete for customers on price, quality, and service, the court

²⁸ *Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 775-76 (D.C. Cir. 1974).

²⁹ See, e.g., *NPRM* at ¶87.

³⁰ *Cincinnati Bell* at 767.

found the Commission's decision to regulate BOC provision of the two services differently to be arbitrary and capricious.³¹ The *Cincinnati Bell* court explained that, "the FCC was required to give a reasoned explanation for its disparate treatment of the Bell companies."³² The court therefore remanded the case to the FCC and directed the agency to "justif[y] keeping the structural separation rule intact for Bell Cellular providers."³³ Thus, the clear implication of *Cincinnati Bell* is that the Commission should eliminate Section 22.903 regulation absent a factual record that such a requirement is necessary and appropriate to serve the public interest, rather than extend the separate affiliate requirement to LEC provision of PCS.

2. Regulatory parity was never intended to rationalize the imposition of unnecessary regulation on CMRS providers.

In an effort to bootstrap new regulation on CMRS providers, the *NPRM* places undue emphasis on whether the proposed rules would lead to regulatory parity, without ever discussing the issue of whether such rules would benefit the public.³⁴ The Commission points to the 1993 Budget Act revisions to the Communications Act as

³¹ Indeed, the FCC previously had proposed to treat the two services alike. See *Notice of Proposed Rulemaking*, 7 FCC Rcd 5676, 5706 (1992).

³² *Cincinnati Bell* at 768.

³³ *Id.*

³⁴ The *NPRM* frequently refers to a "lack of regulatory symmetry," see, e.g., *NPRM* at ¶¶87, and the Commission's "goal of regulatory symmetry. . . ." See, e.g., *NPRM* at ¶115.